Supreme Court, U.S.
FILED

(1)

021143 DEC 16 2002

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH P. PEROT SR. ("pro se")
Petitioner,

vs.

McDONALD'S CORPORATION "et al"
Respondent(s),

ON PETITION FOR WRIT OF CERTIORARI TO

The United States Court of Appeals for the Fifth Circuit .

PETITION FOR WRIT OF CERTIORARI

Joseph P. Perot Sr. ("pro se")
4908 Tamarisk Street
Bellaire, Texas 77401
Phone & Fax Number: 713-661-2176

26 pp

QUESTION(S) PRESENTED

1.) Did the Fifth Circuit Court of Appeals and the District Court ignore well established Texas Law, and Federal Law in their decisions regarding a breach of a 20 year "Ground Lease" dispute in Texas and in doing so unlawfully enforce a settlement agreement?

2.) Did the Fifth Circuit Court of Appeals and the District Court abuse its discretion and make erroneous findings by the court's dismissal of the claim for 1st, "lack of subject matter jurisdiction" then continue to hear and rule on other issues in the claim?

3.) Did the Fifth Circuit abuse its discretion and deny due process, and equal access to the judicial system by sanctioning Perot?

4.) Did the Fifth Circuit Court of Appeals and the District Court (with Judge Harmon presiding) disregard the earlier ruling and order of District Court Judge Hoytt ?

5.) Did the Fifth Circuit Court disregard its earlier rulings and findings as well as those of an arbitrator, and Federal District Judge Hughes in 1997?

6) Did the Fifth Circuit & Judge Harmon deny Perot DUE PROCESS by dismissing the case before discovery and deny my Motion to Compel.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Joseph P. Perot Sr.,
4908 Tamarisk Street
Bellaire, Texas 77401

Marsha Arriens Perot
4908 Tamarisk Street
Houston, Texas 77401

McDonald's Corporation,
Oak Brook, Illinois

Stewart Title Company,
1910 South Post Oak
Houston, Texas

TABLE OF CONTENTS

OPINIONS BELOW.....1.

JURISDICTION.....2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....3.

STATEMENT OF THE CASE.....4.

REASONS FOR GRANTING THE WRIT.....8.

CONCLUSION.....8.

INDEX TO APPENDICES

APPENDIX A DECISION OF THE UNITED STATES COURT OF APPEAIS FOR THE FIFTH CIRCUIT

APPENDIX B DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

APPENDIX C ORDER DENYING REHEARING BY UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX D Order of Fifth Circuit Court of Appeals Denying Appellants Motion to compel production of the Settlement Agreement.

APPENDIX E – District Court's Order Denying Appellants Motion to Compel McDonald's to produce settlement agreement

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Foulds v Texas Tech U. (5th Circuit # 97-11182)---------- 4.

Marathon v. Ruhrgas (5th Circuit # 96-20361) ---------- 5.

Castroville Airport, Inc v. City of Castroville 974 S.W. 2d 207(Court of Appeals of Texas, San Antonio 1998).....5.

Fleming & Associates L.L.P. Plaintiff-Appellant cause #02-20343 dated August 12, 2002---------- 6.

STATUTES AND RULES

Rule 578 ---------- 5.

Rule 12(B)(6)---------- 6.

Supreme Court Rule 29----------10.

OTHER

R. page 51 para. 21 & page 52 para. C---------- 4.

Appellants Record Ex tab A para. 21 & C----------4.

Lease Agreement p.13 par.21& p.12 par C ---------- 4.

R page 91 page 67 @ lines 17 & 18----------4.

Appellants Record Excerpts tab I---------- 5.

OTHER ---Continued

page

R. pages 137 thru 144 ---------- 5

Appendix D---------- 6

R page 21---------- ----------6

R. page 66 line 15 & 16 ---------- 7

R. page 182 ---------- 7

Appellants R E tab D---------- 7

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **Federal courts:**

The opinion of the United States court of appeals appears at Appendix __A__ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix __B___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[x] For cases from **Federal courts:**

The date on which the United States Court of Appeals decided my case was August 19, 2002 - .

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 16, 2002, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No ._____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statute of Fraud

Due Process

Equal right to the Court

Breach of Contract

Right to a jury Trial

STATEMENT OF THE CASE

Please help me. Read the entire Record in particular Appellants Record Excerpts it is not voluminous . 1)Appellant, Perot believes there is presently a binding 20 year Lease Agreement between Perot and McDonald's Corporation and money $60,000 from this Lease is now due Perot. On September 24, 1997 all conditions entitling me to the money were met. 5) In 1996 a different agreement pertaining to this Lease was argued before an Arbitrator (Mr. Fisher), Federal District Judge (Hughes), and the U. S. Fifth Circuit Court of Appeals, all said that any agreement concerning the Lease **to be binding, must be approved by an "authorized officer" of McDonald's and must be in writing, signed by both Perot and McDonald's Corporation.** ***see R. page 51 para 21 & page 52 para c or Appellant R E appendix a, para 21& C or "lease agreement page 13 para. 21" & page 12 para C.*** And because there has not been a single signed document produced purported to be a Settlement Agreement between Perot and McDonald's Corporation that would cancel, waive, or in any way alter this Lease the Lease must be ruled in full force and effect.

Today the 5th Circuit Court of Appeals and U.S. District Court, Judge Ruth Harmon presiding wants to enforce that settlement offer made in 1997 before Federal Judge Hoytt. It was only an offer because an "authorized officer" of McDonald's had not accepted the agreement and neither party had "signed on the dotted line." and McDonald's was not releasing the property until then. ***see R 91 McDonald's attorney, Mr Ashcraft's statement page 67 at lines 17 & 18.***

There were conditions precedent to a binding agreement. McDonald's said in their Brief to the Arbitration in 1996 that I, Perot knew that an "authorized officer" of McDonald's had to approve any agreement concerning the Lease, and it had to be writing and signed by both Perot and McDonald's. ***see Appellants R E tab I or R pgs 137 thru 144.***
If they say I knew, then they know that there was not and is not a settlement agreement between McDonald's and Perot. It had to be approved by McDonald's and must be in writing signed by both parties, and McDonald's continues to hold the property. Stewart & McDonald's are misleading the courts. A Texas case that mirrors mine.

see Castroville Airport v. City of Castroville (Tex. App. -San Antonio 1998) 974 S.W. 2d 207

1.*city council approval of settlement was condition precedent to its enforcement,*

2. *genuine issues of material fact existed as to weather settlement memorandum was conditioned upon execution of a final written agreement (if a party rejects a settlement or other agreement before the performance of a condition precedent to the initial formation of the agreement, the settlement or other agreement may never become enforceable because at the time the condition is satisfied, there would not be an offer and acceptance. also Condition precedent may be either a condition to the initial formation of a contract or to an obligation to perform under an existing agreement.)*

2)The Federal Courts "Lacked jurisdiction" and should have at that point dismissed Perot's case. The Courts failed to follow their previous rulings and of other Federal Courts.

(0)"Furthermore, [w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. **Quote from 5th Circuit opinion cause #97-11182 @ page 6 Carol Rae Cooper Foulds v. Texas Tech University**

See also **Marathon Oil v. Ruhgas ,U.S. Court of Appeals for the Fifth Circuit # 96-20361** *"[t]he appropriate course [for a federal court] is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss*

The case before you today was dismissed for #1 lack of subject matter jurisdiction. The Court should have stopped there and all other issues should be moot. The Court did not stop, they continued to rule on other claims in the case. **6)**And then denied Perot due process by denying all of Perot's Motions, even to file an amended complaint. Then the 5th circuit and the District Court denied Perot's Motion to compel McDonald's to at least produce the "settlement agreement" referred to in the Courts' order of dismissal under**12(b)(6).see Appendix D and R art. #21** You would think I would be entitled to the document and have asked McDonald's to produce a copy McDonald's refused.

The document was not signed and contained material modifications and would have shown that McDonald's "authorized officer" did not accept the offer as made before Judge Hoytt, therefore there was not a binding agreement. The document would show McDonald's had not accepted the offer. Negotiations and offers do not make a binding agreement. The Court fails to state which one of the offers is the agreement or is the courts saying both or neither?

3) The Fifth Circuit Court of Appeals wrongly sanctioned Perot calling the sanction "Harsh". It was indeed "harsh" we live on social security disability and more it was unjust and unfair and meant to further deny us from using the courts pro se. Denying me due process and holding Perot to a higher standard than even lawyers before the court. ie A cause **#02-20343 Fleming & Associates L.L.P. Plaintiff - Appellant** dated August 12, 2002 out of the same District Court, same Judge Harmon as my case. no sanction here The Fifth Circuit wrote

" The advocate is duty bound to protect his clients interests, and choices of venue and timing belong to him.

But the court has the power, indeed the duty , to remind counsel that they are professionals and order their return to the playing field."

4) There were conditions precedent placed on the offer by Judge Hoytt on September 16, 1997 he stated in the **Record page 66 line 15 thru 16** "what ever you think is necessary to make these documents binding or the representations binding on paper." He gave us 90 days.

On Nov. 14, 1997 I canceled all settlement offers *.see Record p. 182 or Appellant's RE tab D* McDonald's knew then there was not a binding agreement or even an offer and McDonald's never went back to the Court.

REASONS FOR GRANTING THE PETITION

(1) The Lower Court lacked jurisdiction.

(2) Injustice was done by the final determination of the suit, and injustice was not caused by Appellant's own inexcusable neglect. (Rule 578)

CONCLUSION

There is presently a binding 20 year ground Lease between Perot and McDonald's and $60,000 is due Perot. The Fifth Circuit abused its discretion and denied Perot due process and equal access to the courts by sanctioning Perot and by denying Appellant, Perot's Motion to Compel McDonald's to produce the "Settlement Agreement". This case was originally in Texas state court and lacking jurisdiction in Federal court it should be sent back to Texas state court. The Fifth Circuit and the District Court completely disregarded the laws of the State of Texas, and Federal rules in their decisions in this case. The Lower courts decisions were unjust.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Joseph P. Perot Sr.
Joseph P. Perot Sr. (pro se)

Date: December 11, 2002.

Appendix A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20176
Summary Calendar

Joseph Perot Sr. ; Marsha A. Perot,

Plaintiffs-Appellants

vs.

McDonald's Corporation; Stewart Title Company,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Houston
(H-01-CV-3167)

Before Jolly, Parker, and Clement, Circuit Judges.

PER CURIAM: (Filed Aug. 19 2002)

Joseph and Marsha Perot, pro se, appeal the district court's judgment dismissing their complaint against McDonald's Corporation and Stewart Title Company. The district court held that it lacked subject matter jurisdiction of the claim against Stewart Title Company and that the complaint failed to state a claim upon which relief could be granted against McDonald's Corporation.

Pursuant to the 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

The appeal is dismissed as frivolous. *See 5th Cir. R. 42.2.* The district court's ruling that it lacked subject matter jurisdiction over the claims against Stewart Title Company was proper because, as is apparent from the face of the complaint, diversity jurisdiction is lacking inasmuch as both the Perots and Stewart Title Company are citizens of Texas. The district court also properly dismissed the Perots' claims against McDonald's Corporation, both because the identical claims were dismissed in a prior action and because the claims are time-barred.

Stewart Title Company's motion for sanctions pursuant to Federal Rule of Appellate Procedure 38 is GRANTED. The Perots' appeal of the dismissal of their claims against Stewart Title Company is utterly frivolous and without merit. They do not even make any attempt to challenge the district court's ruling that it lacked subject matter jurisdiction over those claims, either in their appellate briefs or in their response to the motion for sanctions. Accordingly, we direct the Perots to pay Stewart Title Company sanctions in the amount of $1000 plus double costs. We also warn the Perots that any future abuse of the appellate process in cases filed with this court will surely result in harsher sanctions.

DISMISSED; SANCTIONS IMPOSED; WARNING ISSUED

ATTEST: /s/ CHARLES R. FULBRUGE III
CLERK, U.S. COURT OF APPEALS,
FIFTH CIRCUIT

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH PEROT SR., AND MARSHA A. PEROT,

Plaintiffs

VS. CIVIL ACTION NO. H-01-3167

McDONALD'S CORPORATION AND STEWART TITLE COMPANY

Defendants

ORDER OF DISMISSAL

(Filed Jan. 11 2002)

Pending before the Court in the above referenced, declaratory judgment action, alleging breach of contract (a Ground Lease, Arbitration Agreement, and Amendment to the Arbitration Agreement), negligent misrepresentation, and intentional infliction of emotional distress relating to property owned by pro se Plaintiffs Joseph Perot Sr. and Marsha A. Perot ("the Perots") that Defendant McDonald's Corporation ("McDonald's") agreed to lease for a restaurant, are the following motions: (1) McDonald's motion to dismiss Plaintiffs original complaint (instrument #5) for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted, pursuant to Federal Rule of Civil Procedure 12 (b)(1) and 12(b)(6); (2) Defendant Stewart Title Company's ("Stewart's") motion to dismiss Plaintiffs' original complaint for lack of subject matter jurisdiction (#9); and (3) the Perots' motion to dismiss Defendants' motions (#10).

The Perot's have also filed an amended complaint (#11) without requesting leave of court, that deletes all causes of action except the one for breach of contract and narrows that cause of action to the May 31, 1995 Arbitration Agreement and the August 10, 1995 Amendment to the Arbitration Agreement.

McDonald's motion points out that the Perots allege federal jurisdiction based solely on diversity under 28 U.S.C. §1332. Nevertheless, the first page of the initial complaint states that Plaintiffs and Stewart are citizens of Texas, and therefore diversity does not exist. A Court can grant a motion to dismiss for lack of subject matter jurisdiction based on the face of the complaint. Williamson V. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1982).

McDonald further moves to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. McDonald's contents that in 1996 Plaintiffs filed an identical suit in this court, H-96-1013, Joseph Perot et ux v. McDonald's Corp. ,1 which was dismissed by Judge Hoyt on announcement of settlement, which was read into the court's record on September 16, 1997 and agreed to by the Perots on the record. On January 2, 1998 Judge Hoyt denied the Perots' motion to reinstate. No appeal was taken. As attachments to its motion McDonald's provides copies of the first fourteen pages of Plaintiffs' amended complaint, the portions of the transcript of the announcement of settlement, Judge Hoyt's dismissal order, signed on September 16, 1997, and Judge Hoyt's order denying the motion to reinstate.

Stewart's motion also notes that it, like Plaintiffs, is a citizen of Texas, as reflected on the first page of the complaint. The Perots' response is that because they and McDonald's are citizens of diverse states, Stewart can be joined under Federal Rule of Civil Procedure 20(a) for permissive joinder. They further argue that Judge Hoyt's dismissal was without prejudice. As reflected by the transcript of the settlement hearing, Judge Hoyt, when expressly asked if the dismissal was with prejudice, responded not at this point, but that if counsel wanted a dismissal with prejudice, counsel should file an order of dismissal with prejudice after documentation had been completed. The Perots argue that no such order was submitted or signed, so they can reurge their claim.

The Perots misapply Rule 20(a) here. First, Stewart has already been named as a party in both the original and amended complaints, and therefore there is no joinder to be made.

---

1 Stewart was not a party to the earlier suit.

Second, even if Plaintiffs had filed their suit against McDonald's and then sought to join Stewart, Rule 20 is procedural only and does not affect jurisdictional requirements, i.e., there must still be an independent basis of subject matter jurisdiction. Sunpoint Securities, Inc. v. Porta, 192 F.R.D. 716, 718 (M.D. Fla. 2000) If Stewart were joined, there would be no diversity jurisdiction. No party has claimed that federal question jurisdiction is present here. Therefore Stewart's motion to dismiss must be granted.

Second, Plaintiffs' fail to controvert the evidence presented by McDonald's that this issue was finally resolved after Plaintiffs failed to appeal Judge Hoyt's order of dismissal based on a settlement agreement announced in open court, agreed to under oath by Plaintiffs, and Judge Hoyt's order denying Plaintiffs' request to reinstate.

This Court notes Judge Hoyt's order of dismissal was based on a "90 day order," which would permit the parties to move for reinstatement within ninety days if the settlement were not consummated. Apparently the Perots did not sign the settlement agreement, fired their attorney, and sought reinstatement. Judge Hoyt's denial of that motion made the dismissal, final, regardless weather it was with or without prejudice. The court does not construe the dismissal without prejudice as an invitation for Plaintiffs to file the same claims in the same court several years later. Even if the dismissal were not a bar to such repetition, because Plaintiffs filed this new suit September 14, 2001, and because Plaintiffs' original complaint clearly alleges McDonald's breached its obligation under the Amendment to the Arbitration Agreement (the last of the contracts in dispute to be negotiated) in 1995, their claims are time-barred under the four-year statute of limitations for breach of contract in Texas and their two-year statutes of limitations for the tort claims. Tex. Civ. Prac. & Rem. Code Ann. §§ 16.003 and 16.004 (Vernon Supp. 2001).

Accordingly, the court

ORDERS that Stewart's motion to dismiss is GRANTED for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and McDonald's motion to dismiss is GRANTED with prejudice under Federal Rule of Civil Procedure 12(b)(6)

SIGNED at Houston, Texas, this 10 th day of January, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 02-20176

JOSEPH PEROT, SR; MARSHA A. PEROT
Plaintiffs--Appellants

v.

McDONALD'S CORPORATION;-STEWART TITLE COMPANY
Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING
(Filed Sep.16 2002)

Before Jolly, Parker, and Clement, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED__

ENTERED FOR THE COURT:
/s/ E. Grady Jolly___
United States Circuit Judge
REHG-21

Appendix D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No 02-20176

JOSEPH PEROT, SR; MARSHA A. PEROT
Plaintiffs--Appellants

V.

McDONALD'S CORPORATION; STEWART TITLE COMPANY
Defendants-- Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ORDER: (Filed Apr. 26, 2002)

IT IS ORDERED that appellants' motion to compel production of the Settlement Agreement between McDonald's Corporation and the Perots is DENIED. This appeal will be decided on the record the parties made in the district court.

/s/ /s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

Appendix E.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH PEROT, SR; AND MARSHA A. PEROT Plaintiffs,

VS. CIVIL ACTION NO. H-01-3167

MCDONALD'S CORP. & STEWART TITLE COMPANY, Defendants

ORDER
(Filed Feb. 6, 2002)

Pending before the Court in the above referenced, declaratory judgment action, which the court dismissed on January 11, 2002 without prejudice for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) as to Defendant Stewart Title Company and with prejudice under Rule 12(b)(6) as to Defendant McDonald's Corporation, is pro se Plaintiffs Joseph Perot Sr. and Marsha A Perot's motion to stay, set aside and compel (instrument #18). For reasons indicated in its previous orders, the Court

ORDERS that the motion is DENIED. Plaintiffs shall file no more motions in this action or sanctions may be imposed by the Court.

SIGNED at Houston, Texas, this 5th day of February, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 5 2003

No. 02-1143

IN THE

Supreme Court of the United States

JOSEPH P. PEROT, SR.,

Petitioner,

v.

McDONALD'S CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT McDONALD'S CORPORATION

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LIST OF PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Petitioner:
Joseph P. Perot, Sr.
4908 Tamarisk Street
Bellaire, Texas 77401

Respondent:
McDonald's Corporation
McDonald's Plaza
Oakbrook, Illinois 60523-1900

Co-defendant at trial:
Stewart Title Company
1980 South Post Oak
Houston, Texas 77056

It is unclear whether Stewart Title Company was excluded by Petitioner but the Petition does raise some issues regarding Stewart Title. None are persuasive.

McDonald's Corporation is publicly traded and has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

List of Parties to the Proceedings and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Counterstatement of the Case 1

Summary of the Argument 2

Reasons for Denying the Writ 3

1. The District Court Properly Dismissed Petitioner's Complaint. 3

2. The District Court and the Court of Appeals did not Disregard the Earlier Ruling of Judge Hoyt. 5

Conclusion 6

TABLE OF CITED AUTHORITIES

Page

Cases:

Galt G/S v. JSS Scandinavia, 142 F.3d 1150 (9th Cir. 1998) 3

LeBlanc v. Cleveland, 248 F.3d 95 (2d Cir. 2001) .. 3

May Dept. Stores Co. v. Federal Ins. Co., 305 F.3d 597 (7th Cir. 2002) 3

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989) .. 3

Ralli-Coney, Inc. v. Gates, 528 F.2d 572 (5th Cir. 1976) 3

Statutes:

Tex. Civ. Prac. & Rem. Code §§ 16.003 and 16.004 6

Rules:

Fed. R. Civ. P. 21 3

U.S. Sup. Ct. R. 10 1

COUNTERSTATEMENT OF THE CASE

The Petition should be denied because it fails to satisfy any of the jurisdictional criteria set forth in SUPREME COURT RULE 10. The Petition presents no claim of a conflict in rulings among the Circuit Courts of Appeal or between the Fifth Circuit Court of Appeals and the Texas Supreme Court. No question of federal substantive law is presented. The primary question posed by Petitioner is one of federal procedural law, as to which there is no disagreement among the courts.

In addition, the Petition contains several material misstatements of law and fact, to which McDonald's objects. To assist the Court, McDonald's offers several key points of clarification:

1. As is clear from the Opinion of the Fifth Circuit Court of Appeals attached as Appendix "A" to the Petition, this case does *not* arise in connection with any court's attempt to "enforce" a "settlement offer" as claimed on page 4 of the Petition. This case is merely an attempt by Petitioner to revive dismissed and time-barred contract claims against McDonald's which were previously raised in an earlier lawsuit in the same District and Division (Cause Number H-96-1013), as Judge Harmon carefully explained in her January 10, 2002 Order of Dismissal [Appendix "B" to the Petition and, hereinafter, the "Order of Dismissal"].

2. Petitioner also incorrectly argues that Judge Harmon dismissed his claims against McDonald's for lack of subject-matter jurisdiction [Petition at page 5]. As the Order of Dismissal clearly shows, Petitioner's claims against McDonald's were dismissed by Judge Harmon, both because

the same claims were disposed of in the earlier lawsuit in 1997, and because the claims are now time-barred [Order of Dismissal, page 4].

3. Finally, Petitioner incorrectly argues that Judge Harmon deprived herself of subject-matter jurisdiction to make any further rulings as to Petitioner or McDonald's by first dismissing a dispensable co-defendant, Stewart Title Company, for lack of diversity.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Petitioner's Complaint for failure to state a claim. The current Complaint duplicated nearly *verbatim* an earlier Complaint in a case brought by Petitioner against McDonalds and dismissed by United States District Judge Kenneth Hoyt in 1997. Judge Hoyt's earlier dismissal bars the relitigation of these claims in the present action.

The District Court also properly dismissed the Complaint in this case because all asserted claims were obviously time-barred, based on the factual averments in the Complaint.

In dismissing this case for failure to state a claim, the District Court did not disregard Judge Hoyt's earlier ruling. In fact, the dismissal of this case is based in part on the effect of Judge Hoyt's dismissal of the prior case.

REASONS FOR DENYING THE WRIT

1. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT.

Petitioner's fundamental argument is grounded upon the claim that the District Court had no subject matter jurisdiction to rule on McDonald's Motion to Dismiss. The premise of this argument is that the District Court "deprived" itself of subject matter jurisdiction by first finding that Petitioner and Stewart Title Company were non-diverse - thereby destroying the single basis for subject-matter jurisdiction asserted by Petitioner in his Complaint.

This argument ignores the well-settled rule that a district court may dispose of obviously barred claims against a defendant after dismissing a non-diverse and dispensable co-defendant. FED. R. CIV. P. 21 permits the court to dismiss non-diverse and dispensable defendants in order to preserve diversity subject-matter jurisdiction as to the remaining parties at any stage of the proceedings. This enables the trial court to dispose of obviously barred or improper claims without the need for an additional lawsuit and the attendant waste of judicial resources. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989); *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597 (7th Cir. 2002); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150 (9th Cir. 1998); *LeBlanc v. Cleveland*, 248 F.3d 95 (2d Cir. 2001); *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976).

It is undisputed that Stewart Title Company was merely the escrow agent for certain funds deposited by McDonald's in connection with the now terminated agreements between

Petitioner and McDonald's which form the basis for this lawsuit. Stewart Title Company had no claim to the escrowed funds and was sued simply because it refused to release the funds to Petitioner. Moreover, Petitioner makes no argument that Stewart Title Company was an indispensable or even necessary party to this proceeding.

The District Court was well within its power to preserve subject-matter jurisdiction of the case by dismissing Stewart Title Company for lack of diversity. Moreover, Petitioner does not attack the dismissal of Stewart Title Company *per se*. He merely argues that the dismissal of Stewart Title Company for lack of diversity somehow prevented the District Court from preserving subject-matter jurisdiction of the remaining parties and claims. This is simply erroneous.

Having properly taken steps to preserve jurisdiction of the subject matter of the lawsuit, the District Court next found correctly that Petitioner had litigated the same dispute against McDonald's in a prior-filed case before another District Judge in the same District and Division. The prior Complaint and the pending Complaint were virtually identical [Order of Dismissal, page 2]. Petitioner averred in both Complaints that his claims for relief arose by reason of a transaction occurring in 1995, more than four years prior to the filing date of this suit [*Id.*]. The District Court was, thus, presented with two obvious grounds compelling dismissal and a procedural mechanism enabling it to do so.

2. The District Court and the Court of Appeals did not Disregard the Earlier Ruling of Judge Hoyt.

In contrast to Petitioner's argument that Judge Harmon ignored Judge Hoyt's earlier order of dismissal, the Order of Dismissal was expressly based in part on the *effect of* the earlier ruling of Judge Hoyt in the first lawsuit filed against McDonald's. Judge Harmon found that, since the earlier lawsuit raised the same claims against McDonald's, the dismissal of that lawsuit which was never appealed by Petitioner barred this action against McDonald's [Order of Dismissal, page 2].

Judge Hoyt conditionally dismissed the earlier case after announcement of settlement by Petitioner in open court [Order of Dismissal, page 2]. Petitioner was ordered to file a final judgment reflecting the settlement within ninety days after the announcement. [*Id.*] The case was then involuntarily dismissed because Petitioner failed to file a final judgment and instead moved to reinstate the case. Judge Hoyt denied Petitioner's Motion to Reinstate and Petitioner then took no steps to appeal the dismissal [Order of Dismissal, page 4].

While his conduct in the first lawsuit may be viewed as the product of some ignorance or confusion with respect to the effect of Judge Hoyt's dismissal order, it remains indisputable that Petitioner elected not to appeal that order and is bound by his election.

Separately, the present Complaint raises issues, which are based on factual averments concerning transactions occurring in 1995, more than four years prior to the filing of this lawsuit in 2001. Thus, the Order of Dismissal also noted that dismissal was required because the Complaint on its face

clearly demonstrates that all claims for relief are barred by the applicable statutes of limitation, TEX. CIV. PRAC. & REM. CODE §§ 16.003 and 16.004 [Order of Dismissal, page 4]. Therefore, even if the first lawsuit had never been filed in Judge Hoyt's court, this case would have been the proper subject of the Order of Dismissal issued by Judge Harmon, because all stated claims were time-barred.

CONCLUSION

The District Court's Order of Dismissal was proper and without error. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 02-1143

Supreme Court, U.S.
FILED
MAR 13 2003
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH P. PEROT SR. ("pro se")
Petitioner,

vs.

McDONALD'S CORPORATION "et al"
Respondent(s).

ON PETITION FOR WRIT OF CERTIORARI TO

The United States Court of Appeals for the Fifth Circuit .

REPLY BRIEF OF PETITIONER JOSEPH PEROT SR.

Joseph P. Perot Sr. ("pro se")
4908 Tamarisk Street
Bellaire, Texas 77401
Phone: 713-661-2176
Fax: 713-661-2176

QUESTION(S) PRESENTED

1.) Did the Fifth Circuit Court of Appeals and the District Court ignore well established Texas Law, and Federal Law in their decisions regarding a breach of a 20 year "Ground Lease" dispute in Texas and in doing so unlawfully enforce a settlement agreement?

2.) Did the Fifth Circuit Court of Appeals and the District Court abuse its discretion and make erroneous findings by the court's dismissal of the claim for 1st, "lack of subject matter jurisdiction" then continue to hear and rule on other issues in the claim?

3.) Did the Fifth Circuit abuse its discretion and deny due process, and equal access to the judicial system by sanctioning Perot?

4.) Did the Fifth Circuit Court of Appeals and the District Court (with Judge Harmon presiding) disregard the earlier ruling and order of District Court Judge Hoyt ?

5.) Did the Fifth Circuit Court disregard its earlier rulings and findings as well as those of an arbitrator, and Federal District Judge Hughes in 1997?

6) Did the Fifth Circuit & Judge Harmon deny Perot DUE PROCESS by dismissing the case before discovery and deny my Motion to Compel.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the-
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[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Joseph P. Perot Sr.,
4908 Tamarisk Street
Bellaire, Texas 77401

Marsha Arriens Perot
4908 Tamarisk Street
Houston, Texas 77401

McDonald's Corporation,
Oak Brook, Illinois

Stewart Title Company,
1910 South Post Oak
Houston, Texas

TABLE OF CONTENTS

Questions Presented.....i.

List of Parties.....ii.

Table of Contents.....iii.

Table of Authorities Cited.....iv.

Statement in Reply to McDonald's Counterstatement & Argument.....1.

1. Nearly Verbatim, Slightly Pregnant both very interesting concepts but.....2.

2. Judge Hoyt was answering McDonald's attorney's request for dismissal with prejudice.....4

3. Contracts dated May 31, 1995 and August 10, 1995 and are breached on Sept. 24, 1997 and suit is filed on September 14, 2001, suit is not time barred. 3

REASONS FOR GRANTING THE WRIT.....5.

CONCLUSION.....6.

TABLE OF AUTHORITIES CITED

Cases Page No.

Cherco Properties, Inc. v. Law, Snakard & Gambill, P.C.
985 S.W. 2d 262, 265 (Tex. App. 1999).....4

McDonald's Corporation v. Perots
case # 70 115 0111 95 K American Arbitration
Association (Jan 10 1996).....1

McDonald's Corporation v. Perots
Civil action # H-96-1136 Federal District Court
Judge Lynn Hughes.....1

McDonald's Corporation v. Perots
Fifth Circuit Court of Appeals # 96-20653.....1

Padilla v. LaFrance
907 S.W. 2d 454, 460 (Tex. 1995).....4

Williford Energy Co. v. Submergible Cable Service Inc.
895 S.W. 2d 379, 384 (Tex. App. Amarillo 1994
no writ).....4

STATUTES AND RULES

Rule 578 ----------5 .

Texas Rule of Civil Procedure 11.....4

REPLY TO
MCDONALD'S COUNTERSTATEMENT & Argument

This Petition should be granted to resolve questions left open by the Court's earlier decisions.

McDonald's says the petition presents no claim of a conflict in rulings among the Circuit Courts of Appeal. I, Perot, and the petitioner in this cause say of course it does indeed. Conflict with this Court even. McDonald's is trying to misleading this Court. I ask you to look at the record before you make your decision you will be amazed. McDonald's and Perot had just argued the issue of whether the Ground Lease could be waived or amended in any way or any agreement in connection to the lease could be binding without the acceptance by an "authorized officer" of McDonald's and the signing by both Perot and McDonald's. see *McDonald's Corporation v. Perots, case # 70 115 0111 95 K* before the American Arbitration Assoc. dated Jan. 10, 1996. see also *McDonald's Corporation v. Perots cause # H96-1136* before federal Judge Lynn Hughes dated June 03 1996, and *McDonald's Corporation v. Perots, Appeal # 96-20653* before the Fifth circuit Court of Appeals. In each cause of action it was ruled that McDonald's and Perots must abide by the terms of the lease as written. That any waiver, amendment or any agreement in connection to the lease must be accepted by an "authorized officer" of McDonald's and must be in writing signed by both McDonald's and Perots. Consequentially the rulings by Judge Harmon and the Fifth Circuit Court are in direct conflict with their courts rulings on the same issues.

McDonald's offer of clarification is flawed.

1. The Fifth Circuit Court wrongly, whether intentional or not, by affirming Judge Harmon's ruling is in fact "enforcing a settlement agreement" whether it is the one read into the record before Judge Hoyt but not accepted by McDonald's. Remember "any agreement concerning the lease to be binding, must be approved by McDonald's "authorized officer" and must be in writing, signed by both Perots and McDonald's Corporation." *see* ***R. page 51 para. 21 & page 52 para c or see Appellant R.E. appendix G, para 21 & C see also Lease page 12 para c & page 13 para 21.*** All of these quotes are of McDonald's hand.

Or it could be the one Judge Harmon ruled Perot would not sign the "settlement agreement" McDonald's sent him. McDonald's didn't bother to tell the court it contained an indemnity clause (very big material issue) in McDonald's favor charging the Perots and their heirs with protecting McDonald's for eternity, against third parties in any suit that may arise. And Judge Harmon would not grant Perot leave to file an answer. And the Fifth Circuit would not Compel McDonald's to produce the document.

If the settlement agreement McDonald's sent Perot has material issues that are not in the settlement agreement read into the record that would be a new settlement agreement. Perot had the right not to accept the new settlement offer and did not. Perot did make changes initialed them and sent it back to McDonald's. McDonald's attorney called Perot and said sign as written or else. Perot sent McDonald's letter taking all offers off the table. *see* ***(R 182 or APP. R.E. tab D)*** McDonald's did not go back to the courts either. Judge Harmon erred in her ruling.

2. Here again McDonald's is just plain misstating the facts. The claim before Judge Hoyt claimed money was due Perot under the 1995 Arbitration Agreement and the, 1995 Amendment to the Arbitration. McDonald's claimed under the 1995 Agreements Perot was not due money until Perot got a closure report on environmental issues on the property from the TNRCC and sent it to McDonald's. Then McDonald's would immediately pay Perot. On September 24, 1997 Perot got the Closure Report and sent it to McDonald's removing all conditions precedent to Perot getting the $60,000 rent held in escrow. McDonald's still had possession of the property in 1998 and was refusing to pay the $60,000 that is now for sure due Perot. This was the issue Perot sued for on September 10, 2001. And it was within the 4 year Statute of Limitations. Again Judge Harmon erred in her ruling here. The Fifth Circuit erred in affirming her ruling.

3. Stewart is named in the settlement agreement mailed to Perot by McDonald's. The fact is McDonald's made Stewart a party back then. I thought Stewart should be named in this suit. In August 1998 Stewart and McDonald's entered into a conspiracy whereby Stewart would pay over the $60,000 escrow sums to McDonald's and the two would enter into an indemnity agreement protecting Stewart should Perot file suit. Perot did not know about this indemnity agreement until 2002.

SUMMARY

Nearly Verbatim, Slightly Pregnant both are interesting concepts but probably there is no such thing. You're just as pregnant on day one as day 200. If the 2001 suit is nearly verbatim then it is not verbatim the 1997 suit. In the 1997 McDonald's argument was before the $60,000 would become due only after Perot gave McDonald's a closure report on the property. In the 2001 suit there is not a condition precedent to Perot being entitled to the $60,000 rental for his property.

Under Texas Rules of Civil Procedure 11, a settlement agreement will be enforceable only if it is (1)in writing, (2)signed, and (3) filed as part of the record. see *Cherco Properties, Inc. v. Law, Snakard & Gambill, P.C.*, 985 S.W. 2d 262, 265 (Tex. App. 1999). Texas law further requires that to be enforceable, a settlement agreement must include all material terms-even if performance is to be completed later. *Padilla v. LaFrance*, 907 S.W. 2d 454, 460 (Tex. App. 1995). If a party rejects a settlement or other agreement before the performance of a condition precedent to the initial formation of the agreement, the settlement or other agreement may never become enforceable because at the time the condition is satisfied , there would not be an offer and acceptance. "Before an agreement becomes binding and enforceable there must be an offer and acceptance, and the offer must be accepted in strict compliance with its terms." see *Williford Energy Co. v. Submergible Cable Service Inc, 895 S.W. 2d 379, 384 (Tex. App. Amarillo 1994, no writ)*

This said if the settlement agreement read into the record, which had to be accepted by McDonald's "authorized officer) does not mirror the settlement agreement sent to Perot by McDonald's as to material terms, and it does not, therefore under Texas Law there is not an enforceable settlement agreement between Perot and McDonald's. And Perot is entitled to his day in court before a jury of his peers.

On Nov. 14, 1997 I canceled all settlement offers ***.see Record p. 182 or Appellant's RE tab D*** McDonald's still holding title to the property knew there was not a binding agreement or even an offer and McDonald's never went back to the Court.

REASONS FOR GRANTING THE PETITION

(1) Injustice was done by the final determination of the suit, and injustice was not caused by Appellant's own inexcusable neglect. (Rule 578)

(2) There is direct conflict in the opinions here and earlier opinions on the same issues in the same Federal Courts.

CONCLUSION

There is presently a binding 20 year ground Lease between Perot and McDonald's and $60,000 is due Perot. The Fifth Circuit abused its discretion and denied Perot due process and equal access to the courts by sanctioning Perot and by denying Appellant, Perot's Motion to Compel McDonald's to produce the "unsigned Settlement Agreement" which would have shown that it contains material issues not contained in the settlement before Judge Hoyt. This case was originally in Texas state court and lacking jurisdiction in Federal court it should be sent back to Texas state court. As pointed out in Perot's Petition for writ of Certiorari the Fifth Circuit and the District Court disregarded the laws of the State of Texas , and Federal rules, and even their earlier opinions in their decisions in this case. And the Lower courts decisions simply are not supported by the facts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Joseph P. Perot Sr.
Joseph P. Perot Sr. (pro se)

Date: March 13, 2003.